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Kang Hai Holding Sdn Bhd v Megafest Sdn Bhd (in liquidation) & Ors and another appeal

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COURT OF APPEAL (PUTRAJAYA) — CIVIL SUIT NOS J-01(IM)(NCVC)-232–03 OF 2018 AND J-01(IM)(NCVC)-231–03 OF 2018
HAMID SULTAN, HANIPAH FARIKULLAH AND KAMALUDIN MD SAID JJCA
15 JUNE 2020

C

Civil Procedure — Appeal — Appeal against judgment of High Court — Whether appellant failed to show trial judge was plainly wrong in deciding to dismiss its claim — Whether trial judge had evaluated all the evidence properly and correctly found that appellant/plaintiff had failed to prove its case on balance of probabilities

D

OCBC Bank (M) Bhd ('OCBC') had granted a loan to the first respondent ('R1') on the security of two industrial lands ('the properties') created as third party charges in favour of OCBC. The lands belonged to Kang Hai Realty Sdn Bhd ('KHR') and Kang Hai Holdings Sdn Bhd ('KHH') — the appellants in the two appeals herein. The founder and/or owner and/or managing director of R1 as well as of the appellants was one Lim Thian Hock @ Lim Thiam Hock ('the deceased Lim') who controlled the three companies until he became bankrupt and later passed away. The taking of the loan from OCBC was the deceased Lim's idea and the appellants had passed respective board of directors' meetings to approve the creation of the third-party charges in favour of OCBC to secure the loan. The appellants later discovered that the loan monies had been misused by third parties and not by R1. R1 failed to repay the loan and when it was wound up and the deceased Lim passed away, the appellants were forced to use RM5.8m of their own funds to redeem the properties to prevent them from being foreclosed by OCBC. Contending that they had suffered loss and damages as a result, the appellants separately sued the respondents in the High Court for recovery of the redemption sums, for breach by the relevant respondents of their fiduciary duties towards KHH and KHR and for conspiring to injure the appellants in unlawfully creating the charges. The cause of action against R1 was for an indemnity premised on ss 93 and 98 of the Contracts Act 1950. Following a joint trial of the two actions, the High Court held that, on balance of probabilities, the appellants had failed to prove their claims on balance of probabilities. The instant appeals were against the dismissal of the appellants' claims.

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Held, unanimously dismissing both appeals:

(1) There was no appealable error in the trial court's judgment. The trial court's decision was not shown to be plainly wrong (see para 76).

(2) KHH, KHR and R1 were controlled by the deceased Lim. He made the decisions in the management and business affairs of the three companies and he was behind the creation of the third-party charges. The creation of the charges was lawful because the boards of directors of KHH and KHR had passed their respective resolutions to create the charges in favour of OCBC for the benefit of R1 (see paras 56 & 58).

(3) The trial judge was not plainly wrong in finding, after evaluating all the evidence, that the allegation that the respondents had committed fraud or had conspired with each other with illegal intention or by unlawful means to injure the appellants or that they had breached their fiduciary duties to cause damage to the appellants had not been made out (see paras 60 & 66).

[Bahasa Malaysia summary

OCBC Bank (M) Bhd ('OCBC') telah meluluskan pinjaman kepada responden pertama ('R1') atas jaminan dua bidang tanah perindustrian ('hartanah tersebut') sebagai gadaian pihak ketiga terhadap OCBC. Hartanah tersebut dimiliki oleh Kang Hai Realty Sdn Bhd ('KHR') dan Kang Hai Holdings Sdn Bhd ('KHH') — perayu dalam dua rayuan di sini. Pengasas dan/atau pemilik dan/atau pengarah urusan R1 serta perayu adalah seorang Lim Thian Hock @ Lim Thiam Hock ('si mati Lim') yang mengendalikan ketiga syarikat tersebut sehingga beliau muflis dan kemudiannya meninggal dunia. Permohonan pinjaman dari OCBC adalah cadangan si mati Lim dan pihak perayu telah mengusulkan mesyuarat lembaga pengarah masing-masing untuk meluluskan gadaian pihak ketiga bagi OCBC sebagai jaminan pinjaman. Perayu kemudiannya mendapati bahawa wang pinjaman telah disalahgunakan oleh pihak ketiga dan bukan oleh R1. R1 gagal melunaskan kembali pinjaman dan apabila ianya digulungkan dan si mati Lim meninggal dunia, perayu terpaksa menggunakan wang mereka sebanyak RM5.8 juta untuk menebus hartanah tersebut bagi mengelakkannya dilelong oleh OCBC. Dengan mendakwa bahawa mereka telah mengalami kehilangan dan kerugian, pihak perayu secara berasingan telah menyaman pihak responden di Mahkamah Tinggi untuk mendapatkan kembali jumlah wang tebusan, kerana responden yang berkaitan telah melanggar tugas fidusiari mereka bagi KHH dan KHR dan kerana berkonspirasi untuk merugikan pihak perayu dalam membuat gadaian secara tidak sah. Kausa tindakan terhadap R1 adalah untuk ganti rugi yang diperuntukkan dalam ss 93 dan 98 Akta Kontrak 1950. Setelah perbicaraan bersama kedua-dua tindakan tersebut, Mahkamah Tinggi memutuskan bahawa, berdasarkan imbangan kebarangkalian, perayu telah gagal membuktikan tuntutan mereka pada imbangan kebarangkalian. Rayuan semasa adalah terhadap penolakan tuntutan perayu.

Diputuskan, dengan sebulat suara menolak kedua-dua rayuan: A

(1) Tidak ada kekhilafan yang harus dirayu dalam keputusan mahkamah. Keputusan mahkamah perbicaraan tidak dapat dibuktikan jelas terkhilaf (lihat perenggan 76).

(2) KHH, KHR dan R1 dikendalikan oleh si mati Lim. beliau membuat keputusan dalam pengurusan dan perniagaan ketiga-tiga syarikat tersebut dan beliau adalah disebalik gadaian pihak ketiga yang dibuat. Gadaian yang dibuat adalah sah kerana lembaga pengarah KHH dan KHR telah meluluskan resolusi masing-masing untuk membuat gadaian tersebut terhadap OCBC bagi kepentingan R1 (lihat perenggan 56 & 58). B C

(3) Hakim perbicaraan tidak terkhilaf dalam dapatannya, setelah menilai kesemua bukti, dakwan bahawa responden telah melakukan penipuan atau berkomplot satu sama lain dengan niat tidak sah atau dengan cara yang tidak sah untuk merugikan perayu atau mereka telah melanggar tugas fidusiari mereka untuk menyebabkan kerugian kepada perayu tidak dapat dibuktikan (lihat perenggan 60 & 66).] D

Cases referred to E

Bank Pertanian Malaysia Bhd v MCI Bio Tech Sdn Bhd [2013] 6 MLJ 537; [2013] 9 CLJ 29, CA (refd)

Conlay Construction Sdn Bhd v Perembun (M) Sdn Bhd [2014] 1 MLJ 80; [2013] 9 CLJ 828, FC (refd)

Deepak Jaikishan a/l Jaikishhan Rewachand & Anor v Intrared Sdn Bhd (previously known as Reetaj City Centre Sdn Bhd and formerly known as KFH Reetaj Sdn Bhd) & Anor [2013] 7 MLJ 437, HC (folld) F

Dr Shanmuganathan v Periasamy s/o Sithambaram Pillai [1997] 3 MLJ 61, FC (refd)

Dream Property Sdn Bhd v Atlas Housing Sdn Bhd [2015] 2 MLJ 441, FC (refd) G

Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors [2005] 2 MLJ 1, FC (refd)

Hock Hua Bank (Sabah) Bhd v Lam Tat Ming & Ors [1995] 4 MLJ 328, HC (refd)

Jaafar bin Shaari & Anor (suing as administrators of the estate of Shofiah bte Ahmad, deceased) v Tan Lip Eng & Anor [1997] 3 MLJ 693, SC (refd) H

Khoo Teng Chye v Cekal Berjasa Sdn Bhd & Anor [2015] MLJU 992; [2015] 6 CLJ 449, CA (refd)

Lee Wai Fay & Anor v Lee Seng Ein [2005] 4 MLJ 701; [2005] 3 CLJ 397, CA (refd) I

Lembaga Penggalakan Pelancongan Malaysia v One Big Option Sdn Bhd [2018] 1 MLJ 465, CA (refd)

Letchumanan Chettiar Alagappan @ L Allagappan (as executor to SL Alameloo Achi alias Sona Lena Alamelo Acho, deceased) & Anor v Secure Plantation Sdn

A *Bhd* [2017] 4 MLJ 697, FC (refd)
Lin Wen-Chih & Anor v Mycom Bhd [2014] 3 MLJ 691, CA (refd)
Lonrho plc v Fayed and others [1991] 3 All ER 303, HL (refd)
Lonrho Ltd and others v Shell Petroleum Co Ltd and others (No 2) [1981] 2 All ER 456, HL (refd)
B *Lum Sow Kuen v Chuah Choong Heong & Ors* [1998] MLJU 39, HC (refd)
MMC Oil & Gas Engineering Sdn Bhd v Tan Bock Kwee & Sons Sdn Bhd [2016] 2 MLJ 428, CA (refd)
Merbok Hilir Bhd v Sheikh Khaled Jassem bin Mohammad Jassem Al-Thani (t/a Petroserv General Trading Establishment) and other appeals [2013] 5 MLJ
C 407; [2013] 8 CLJ 309, CA (refd)
Merita Merchant Bank Singapore Ltd v Dewan Bahasa dan Pustaka [2018] supp MLJ 33; [2014] 9 CLJ 1064, FC (refd)
Mrs Kok Wee Kiat v Kuala Lumpur Stock Exchange Berhad & Ors [1979] 1 MLJ 71, FC (refd)
D *PJTV Denson (M) Sdn Bhd & Ors v Roxy (Malaysia) Sdn Bhd* [1980] 2 MLJ 136, FC (refd)
Pushpaleela a/p R Selvarajah & Anor v Rajamani d/o Meyappa Chettiar and other appeals [2019] 2 MLJ 553, FC (refd)
E *Regina v Simmonds and others* [1969] 1 QB 685, CA (refd)
Renault SA v Inokom Corp Sdn Bhd & Anor and other appeals [2010] 5 MLJ 394, CA (refd)
S Quarry Sdn Bhd v Desaru Development Corp Sdn Bhd & Ors [2019] MLJU 99; [2019] 1 LNS 93, CA (refd)
F *SCK Group Berhad & Anor v Sunny Liew Siew Pang & Anor* [2010] MLJU 1376; [2010] 9 CLJ 389, CA (refd)
Seagate Technology (S) Pte Ltd & Anor v Heng Eng Li & Anor [1994] 1 SLR 534, HC (refd)
Seagate Technology Pte Ltd & Anor v Goh Han Kim [1995] 1 SLR 17, CA (refd)
G *Sorrell v Smith* [1925] AC 700, HL (refd)
Superintendent of Lands & Surveys, Bintulu v Nor Anak Nyawai & Ors and another appeal [2006] 1 MLJ 256; [2005] 3 CLJ 555, CA (refd)
Syarikat Kemajuan Timbermine Sdn Bhd v Kerajaan Negeri Kelantan Darul Naim [2015] 3 MLJ 609; [2015] 2 CLJ 1037, FC (refd)
H *Takako Sakao (f) v Ng Pek Yuen (f) & Anor* [2009] 6 MLJ 751, FC (refd)
UEM Group Bhd (previously known as United Engineers (M) Bhd v Genisys Integrated Engineers Pte Ltd & Anor [2018] supp MLJ 363; [2010] 9 CLJ 785, FC (refd)
I *Winkworth v Edward Baron Development Co Ltd and others* [1987] 1 All ER 114, HL (refd)
Yu Gui v Jeffery Law Siew Su & Ors [2016] 1 MLJ 102; [2016] 7 CLJ 540, CA (refd)

Legislation referred to

Companies Act 1965
Contracts Act 1950 ss 93, 98
Evidence Act 1950 s 114(g)

Appeal from: Suit No 22NCVC-59–06 of 2013 (High Court, Kuala Lumpur)

David Mathews (Ng Ken Yong with him) (Mathews Hun Lachimanan) for the appellants.
Raj Shankar (Raj Shankar) for the first respondent.
Mohamad Hanafi bin Basri (Senior Federal Counsel, Malaysian Department of Insolvency) for the second respondent.
Jean Lew (GC Lew & Co) for the third and fourth respondent.
Lim Jit Kiong (Ho Yit Jean with him) (JK Lim) for the sixth respondent.
Ng Chew Hor (Ng, Fan & Assoc) for the fifth and eighth respondent.

Kamaludin Md Said JCA:

INTRODUCTION

[1] There were two appeals fixed before this court ie Civil Appeal No J-01(IM)(NCVC)-231–03 of 2018 ('Appeal 231') and Civil Appeal No J-01(IM)(NCVC)-232–03 of 2018 ('Appeal 232'). The appellant in Appeal 231 is Kang Hai Holdings Sdn Bhd ('KHH') and in the appellant in Appeal 232 is Kang Hai Realty Sdn Bhd ('KHR').

BACKGROUNDS FACTS

[2] KHH initiated Muar High Court Suit No 22NCVC-59–06 of 2013 ('Suit 59') against the first respondent and nine others. KHR initiated Muar High Court Suit No 22NCVC-18–04 of 2014 ('Suit 18') against the first respondent and nine others.

[3] The nature of claim by KHH and KHR against the respondents are in relation to losses incurred resulting from redemption of the two properties owned by KHH (property D) and KHR (property C) whereby the said properties were a third party charge to OCBC Bank (M) Bhd as guarantee for financing facilities extended to the first respondent. KHH and KHR averred that the financing facilities was not used for the legitimate trade purposes of the first respondent but was used for the benefit of various third parties including other individual name Chew Choon Fang.

[4] KHH and KHR incurred losses arising from the said redemption and settlement with OCBC Bank (M) Bhd. KHH and KHR respectively filed writs

of summons against the first respondent till the ninth respondents for tort of conspiracy for causing injury to KHH and KHR and for breach of fiduciary duties to KHH and KHR and to claim losses incurred.

[5] At all material times, the respondents' position in KHH, KHR and first respondent were as follows:

(a) Lim Thian Hock @ Lim Thiam Hock ('the deceased Lim') the second respondent is the founder and/or owner and/or managing director for KHH, KHR and the first respondent;

(b) the third respondent was the employee of KHH, KHR and first respondent. The third respondent was appointed as one of the director for KHH and KHR on 20 June 2005. The third respondent resigned from KHH and KHR on 15 September 2008. The third respondent was also appointed as one of the director for first respondent. On 31 May 2005. The third respondent had resigned as first respondent's director on 18 September 2008;

(c) the fourth respondent was appointed as secretary for the deceased Lim. The fourth respondent was appointed as one of the directors for first respondent on 20 June 2002. The fourth respondent had resigned from first respondent on 3 May 2007. The fourth respondent was also appointed as one of the directors for KHH and KHR on 7 January 2004. The fourth respondent had resigned from KHH and KHR on 4 June 2007;

(d) during the appointment of the third and fourth respondents as the directors for KHH, KHR and first respondent, the deceased Lim had given an indemnity letter to each third and fourth respondent;

(e) the fifth respondent was the director of first respondent from 3 March 2004 until 20 October 2006 and director of KHH and KHR from 7 January 2004 until 15 September 2008;

(f) the sixth respondent is son of the deceased Lim and the younger brother of the ninth respondent. The sixth respondent was the alternate director to the deceased Lim sometimes on 16 September 2010;

(g) the seventh respondent was the director of first respondent from 3 May 2007 until 13 February 2012 and was appointed as director of KHH and KHR from 1 February 1998 until 15 September 2008;

(h) the eighth respondent was the secretary of KHH and KHR from 1 February 1993 to 15 September 2008; and

(i) the ninth respondent is the son of the deceased Lim and younger brother of the sixth respondent. The ninth respondent was the manager of first respondent from 28 February 2005 until 1 October 2008.

[6] Both KHH and KHR are associated companies of the first respondent. The first respondent is a company registered under the Malaysian Companies Act 1965. first respondent is running the textile manufacturing business.

[7] The deceased Lim had given a guarantee and to indemnify the third and fourth respondents from any legal liability that may incur during the appointment of the third and fourth respondents as the directors and during execution of the deceased Lim's instructions for KHH, KHR and first respondent.

[8] On 8 August 2005, OCBC Bank (M) Bhd had issued a letter offer for trade facility of the amount of RM10m to first respondent ('first offer'). On 23 August 2005, first respondent had issued a company resolution to accept the first offer and to create a third party charge on the following properties as security for the first offer:

(a) an industrial land held under Lot 4980 Geran 92051, Mukim Simpang Kanan, Daerah Batu Pahat, Negeri Johor Darul Takzim ('property C');

(b) an industrial land held under HS(M) 2044 PTD 5417, Parit Wah Lahu, Mukim Linau, Daerah Batu Pahat, Negeri Johor Darul Takzim ('property D');

(c) a double storey shophouse held under HS(M) 8467 PTD 13678, Pekan Parit Raja, Mukim Sri Gading, Batu Pahat, Johor Darul Takzim ('property E');

(d) a double storey shophouse held under HS(M) 8468 PTD 13679, Pekan Parit Raja, Mukim Sri Gading, Batu Pahat, Johor Darul Takzim ('property F');

(e) a double storey shophouse held under HS(M) 8469 PTD 13680, Pekan Parit Raja, Mukim Sri Gading, Batu Pahat, Johor Darul Takzim ('property G');

(f) a double storey shophouse held under HS(M) 8475 PTD 13686, Pekan Parit Raja, Mukim Sri Gading, Batu Pahat, Johor Darul Takzim ('property H');

(g) a double storey shophouse held under HS(M) 8476 PTD 13687, Pekan Parit Raja, Mukim Sri Gading, Batu Pahat, Johor Darul Takzim ('property I'); and

(h) a bungalow house held under HS(M) 2377 PTD 26833, BT 4, Jalan Kluang, Mukim Simpang Kanan, Batu Pahat, Johor Darul Takzim ('property J').

A **[9]** On 25 August 2005, KHH had issued a company resolution approving the creation of the third party charge on properties C, D, E, F, G, H, I and J for the first offer.

B **[10]** Although first respondent had obtained the first offer and third party charges were created, there was not a single withdrawal from the first offer by first respondent.

C **[11]** On 18 March 2008, pursuant to the deceased Lim's application, the first offer was revised from RM10m to RM5m ('revised offer'). The property C and D were remained as security for the revised offer.

D **[12]** KHH had agreed and approved the revised offer vide company resolution dated 24 March 2008. Upon the approval of the revised offer, first respondent had withdrawn the amount of RM5m (in batches) in order to manage and to pay the suppliers.

E **[13]** The first respondent was wound up on 2 July 2012 and the liquidator was appointed.

[14] On 11 July 2012, the deceased Lim was adjudged bankrupt and passed away on 23 January 2015.

F **[15]** The fifth respondent is a bankrupt.

[16] The eighth respondent did not enter appearance despite the writ summon and the statement of claim were duly served on him and KHH and KHR also have made an application for a judgment on merit to be entered G based on proven facts.

[17] The first respondent claims indemnity and contribution from the deceased Lim, third, fourth, fifth, sixth, seventh and the ninth respondents.

H **[18]** The court ordered that both civil suits to be tried jointly and documents referred to file in Suit 59 which in this appeal is Appeal 232.

[19] The High Court after hearing the case, dismissed the appellant's claim I with costs.

DECISION OF HIGH COURT

[20] The learned JC identified two issues arise from KHH's and KHR's claim and having considered the totality of evidence before him, determined the issues and made his findings as follows

First issue: Whether the first, third, fourth, sixth, seventh and ninth respondents had conspired to cause damages to KHH and KHR?

[21] The learned JC found that KHH and KHR have failed to prove that the third, fourth, sixth, seventh and ninth respondent as well as the second respondent and the fifth respondent had entered into an agreement to commit the fraud as alleged.

[22] Both KHH and KHR also have failed to prove the third, fourth, sixth, seventh and ninth defendants have committed the tort of conspiracy to injure KHH and KHR.

Second issue: Whether the third, fourth, sixth, seventh and ninth respondents had breached their fiduciary duty towards KHH and KHR?

[23] The learned JC found that KHH and KHR failed to show those respondents aforementioned had breached their fiduciary duty towards KHH and KHR.

[24] On the balance of probabilities, the learned JC found that KHH and KHR have failed to prove their claim against the first, third, fourth, sixth, seventh and ninth defendants.

[25] There is no issue arising from the failure of the fourth and sixth respondents to give evidence as KHH and KHR have failed to prove that the fourth, sixth respondent together with the third, seventh, ninth respondents as well as the second and fifth respondents had committed the tort of conspiracy with the purpose of causing damages to KHH and KHR.

[26] It is also his finding that KHH and KHR have failed to prove that the eighth respondent had breached his fiduciary duty and the application made by solicitors for KHH and KHR to enter a judgment against the eighth respondent on merit is disallowed.

THE FULL FINDING OF FACTS

[27] The third and the fourth respondents were appointed as a director of first respondent, KHH and KHR. The said letter of indemnity issued by the

second respondent to the third and fourth respondents states that the role of the third and fourth respondent shall only be as per directions of the deceased Lim and that the third and fourth respondents shall be indemnified against any claims and liability which shall arise when acting as directors. This is confirmed by KHH and KHR's fifth witness, Chew Choon Fang (SP5) who worked as a private secretary for the deceased Lim who had testified that the role of the deceased Lim was the main employer and that the directions given by the deceased Lim cannot be disobeyed. The learned JC found there is no overt act on the part of the third and fourth respondents which shows that third and fourth respondents had entered into an agreement with the fourth respondent, the sixth respondent, the seventh respondent, the ninth respondent as well as the deceased Lim and the fifth respondent to commit the fraud as alleged by KHH and KHR. In addition to that, the fourth respondent had resigned as a director in first respondent, KHH and KHR before the revised offer was received in 2008. There is no evidence to show the involvement of the fourth respondent in the revised offer.

[28] The learned JC found the evidence adduced by KHH and KHR through SP5 and Kek Ley Lan (SP11) confirms that the sixth respondent was not working for first respondent. There is no evidence that shows the involvement of the sixth respondent in the creation of charge on property D and property C. There is also no evidence to show that directors of KHH and KHR had acted on the instructions of the sixth respondent when the charges on property D and property C were created. And there is also no evidence to show that all employee of first respondent had acted on the instructions of the sixth respondent. The evidence of Lim Ah Na (SP2), SP5, and SP11 instead shows that all employees and other directors in first respondent acted as per the deceased Lim's wishes. Evidence adduced by KHH and KHR that suggests that the sixth respondent was a joint signatory on the application form that was used for the drawdown of the revised financing facility cannot be substantiated to show that it was an overt act on the part of the sixth respondent which shows that the sixth respondent had entered into an agreement with the third respondent, the fourth respondent, the seventh respondent, the ninth respondent as well as the deceased Lim and the fifth respondent to commit the fraud as alleged by KHH and KHR.

[29] The evidence of the seventh respondent shows that the seventh respondent did not play any role and was in no way whatsoever involved in the financing facility and the revised financing facility. The seventh respondent did not play an active role in KHH, KHR or first respondent because at that material time, the seventh respondent was stationed at Gua Musang, Kelantan as Plantation Senior Manager for another company belonging to the deceased Lim, ie Absolute Ascend Sdn Bhd. The duties of the seventh respondent as a director in first respondent as determined by the deceased Lim were only

limited to signing off resolutions of the company approved by the company secretary. The evidence is supported by the evidence of SP11. The learned JC made a finding that there is no evidence adduced by KHH and KHR that shows an overt act on the part of the seventh respondent which can be inferred as the seventh respondent having entered into an agreement with the third respondent, the fourth respondent, the seventh respondent, the ninth respondent as well as the deceased Lim and the fifth respondent to commit the fraud as alleged by KHH and KHR.

[30] The learned JC found the evidence adduced by KHH and KHR through SP5 and SP11 confirms that the ninth respondent was not working for first respondent. There is no evidence that shows that the involvement of the ninth respondent in the application for financing facility and the revised financing facility granted by OCBC Bank (M) Bhd. There is no evidence that shows the involvement of the ninth respondent in the creation of charges on property D and property C. Further to that, there is no evidence to show that the directors of KHH and KHR had acted on the instructions of the ninth respondent when the charges were created on property D and property C. And also there is no evidence to show that other directors in first respondent had acted on the instructions of the ninth respondent. There was no overt act on the part of the ninth respondent which could show that the ninth respondent had entered into an agreement with the third respondent, the fourth respondent, the seventh respondent as well as the deceased Lim and the fifth respondent to commit the fraud as alleged by KHH and KHR.

[31] The learned JC found that the third respondent had approved the resolutions pertaining to the financing facility and the revised facility. Resolutions signed by the third respondent were aimed at obtaining financing facility for the benefit of the first respondent. Involvement of the third respondent was based on instruction given by the deceased Lim. The revised facility was deposited into the first respondent's bank account. The act of the third respondent signing the resolutions were for the benefit of the first respondent and not intended to injure KHH and KHR. Owing to the fact that KHH and KHR have failed to prove the existence of an agreement between the third respondent, the fourth respondent, the sixth respondent, the seventh respondent as well as the deceased Lim and the fifth respondent, then the execution of an agreement by the third respondent that could have been detrimental to KHH and KHR is improbable.

[32] It was also found that the fourth respondent was not involved in matters pertaining to the revised financing facility granted by OCBC Bank (M) Bhd. The fourth respondent had resigned as a director of first respondent, KHH and KHR before the revised offer was received. KHH and KHR's first witness, Ng Soo Leng (SP1) agreed in cross examination that the revised financing facility

and the drawdown of the facility only took place after the fourth respondent had resigned as a director. There was no action on the part of the fourth respondent that was intended to cause injury to KHH and KHR. Owing to the fact that KHH and KHR have failed to prove the existence of an agreement between the third respondent, the fourth respondent, the sixth respondent, the seventh respondent, the ninth respondent as well as the deceased Lim and the fifth respondent, then it wouldn't have been possible that the fourth respondent had executed an agreement that could have caused losses to KHH and KHR.

[33] There was no action on the part of the sixth respondent that was intended to cause injury to KHH and KHR. KHH and KHR have failed to prove the existence of an agreement between the sixth respondent, the third respondent, the fourth respondent, the seventh respondent, the ninth respondent as well as the deceased Lim and the fifth respondent. Therefore, any execution of an agreement by the sixth respondent which could have caused losses to KHH and KHR would be improbable. Even in the event where such agreement involving the sixth respondent had existed, KHH and KHR have failed to prove that the sixth respondent had executed the agreement which could have caused losses to KHH and KHR. There is no evidence which points to the fact that the sixth respondent had withdrawn and utilised the proceeds from the revised financing facility which was deposited into the banking account held by first respondent. It would be impossible for the sixth respondent to use the money deposited in the first respondent's account because all cheque books were kept by Neo Thian Chua who served at the first respondent's finance manager.

[34] The learned JC concluded that KHH and KHR have failed to show any action taken by the seventh respondent which was aimed at causing injury to KHH and KHR. The seventh respondent acted on the deceased Lim's instructions. KHH and KHR have failed to prove the existence of an agreement between the seventh respondent, the third respondent, the fourth respondent, the sixth respondent, the ninth respondent as well as the deceased Lim and the fifth respondent. Therefore, the execution of an agreement by the seventh respondent that could have caused losses to KHH and KHR is improbable.

[35] There was no action on the part of the ninth respondent that was intended to cause injury to KHH and KHR. KHH and KHR have failed to prove the existence of an agreement between the ninth respondent, the third respondent, the fourth respondent, the sixth respondent, the seventh respondent as well as the deceased Lim and the fifth respondent. Therefore, any execution of an agreement by the ninth respondent which could have caused losses to KHH and KHR would be improbable. Even in the event where such

agreement involving the ninth respondent had existed, KHH and KHR have failed to prove that the ninth respondent had executed the agreement which could have caused losses to KHH and KHR. The ninth respondent was never involved in matters pertaining to the application for withdrawal or had withdrawn the proceeds from the revised financing facility which was deposited into the banking account held by first respondent. It would be impossible for the ninth respondent to use the money deposited in first respondent's account because all cheque books were kept by Neo Thian Chua.

[36] It was also discovered that evidence of SP11 shows Neo Thian Chua served as finance manager at the deceased Lim's companies including KHH and first respondent. Neo Thian Chua retained all cheque book, handled all matters in relation to application for first respondent's facilities, including all drawdowns from banks, handled the account held at OCBC Bank (M) Sdn Bhd including drawdowns. Neo Thian Chua also prepared invoices used for the drawdown of the revised facility. Inevitably, the calling of Neo Thian Chua by KHH and KHR as a witness would have helped in detailing the drawdown transactions of the revised facility. However, KHH and KHR did not call Neo Thian Chua to give evidence. The court adopts the adverse inference principal against KHH and KHR under s 114(g) of the Evidence Act for failing to call Neo Thian Chua as a witness. Also there is a possibility that Neo Thian Chua is involved in the conspiracy as alleged by KHH and KHR owing to the position and role played by Neo Thian Chua in first respondent. However, KHH and KHR did not name Neo Thian Chua in both of these civil suits as one of the defendant despite knowing that Neo Thian Chua was the finance manager of first respondent and had prepared invoices used in the drawdown of the said revised facility.

[37] The learned JC came to his finding that on a balance of probabilities, KHH and KHR have failed to prove their claim against first respondent, the third respondent, the fourth respondent, the sixth respondent, the seventh respondent and the ninth respondent. In other words, the claim for tort of conspiracy to injure KHH and KHR was not proven against the said respondents.

[38] It was submitted before the learned JC that the deceased Lim, the fourth respondent, the fifth respondent, the seventh respondent, the eighth respondent are directors of KHH and KHR and therefore they have a fiduciary duty towards KHH and KHR. They had acted in neglect of the best interest of KHH and KHR by causing and/or allowing and have been involved in actions detrimental to KHH and KHR. Further, the ninth respondent had been proven to be first respondent's de facto director. The ninth respondent had acted in neglect of the interest of KHH and KHR in relation to the properties and had therefore breached his fiduciary duty towards KHH and KHR.

[39] The learned JC found the evidence adduced by KHH and KHR cannot show how the third respondent, the fourth respondent, the seventh respondent, the eighth respondent had breached their respective fiduciary duty towards KHH and KHR. There is no evidence showing that the third respondent, the fourth respondent, the seventh respondent, the eighth respondent had acted in neglect of the best interest of KHH and KHR. Therefore, the third respondent, the fourth respondent, the seventh respondent and the eighth respondent had not breached their fiduciary duty towards KHH and KHR. KHH and KHR have failed to prove that the third respondent, the fourth respondent, the seventh respondent, the eighth respondent had breached their respective fiduciary duty towards KHH and KHR.

[40] It was the finding of the learned JC that evidence presented by KHH and KHR shows that the ninth respondent is first respondent's de facto director. There is, however, no evidence showing that the ninth respondent had acted in neglect of the interest of KHH and KHR. The ninth respondent had therefore not breached his fiduciary duty towards KHH and KHR. KHH and KHR have failed to prove that the ninth respondent had breached his fiduciary duty towards KHH and KHR.

[41] On a balance of probabilities, the learned JC found KHH and KHR have failed to prove their claim against first respondent, the third respondent, the fourth respondent, the sixth respondent, the seventh respondent and the ninth respondent.

[42] The learned JC also found that indemnity and contribution claim by first respondent against the deceased Lim, the third respondent, the fourth respondent, the fifth respondent, the sixth respondent, the seventh respondent and the ninth respondent does not arise because it is the court's finding that first respondent is not liable for the claim made by KHH and KHR. KHH and KHR have also failed to prove that the eighth respondent had breached his fiduciary duty towards KHH and KHR. The application made by solicitors for KHH and KHR to enter a judgment against the eighth respondent on merit was disallowed.

GROUNDS OF APPEAL

[43] KHH and KHR ('the appellant') in its memorandum of appeal states that the learned JC erred in law and on the facts in arriving at the decision on the following grounds:

(a) by failing to find on a preponderance of evidence that the appellant had established liability against the:

(i) first respondent for an indemnity pursuant to ss 93 and 98 of the Contracts Act 1950 for losses incurred as a result of having to redeem and discharge its property held under HS(M) 2044 PTD 5417, Parit Wah Lahu, Mukim Linau, District of Batu Pahat, State of Johor Darul Takzim with factory building erected thereon ('property D') which was subject to third party first legal charge ('charge') in favor of OCBC Bank (M) Bhd ('OCBC') to secure the repayment of monies due and owing under financing facility ('invoice financing facility') granted by OCBC to the first respondent which the first respondent was unable to repay;

(ii) second to seventh respondents for breach of their fiduciary duties to the appellant for the wrongful creation of the charge and for the losses resulting therefrom as a result of the appellant having to redeem and discharge property D by reason of the first respondents inability to repay the monies due and owing under the invoice financing facility;

(iii) second to sixth and eighth respondents for the tort of conspiracy to injure by their participation in the scheme to injure the appellant (as defined in the amended statement of claim) which included wrongfully encumbering property D and ensuring that the first respondent was unable to repay the monies due and owing under the invoice financing facility; and

(iv) second, third, fourth, fifth and sixth respondents for breach of their duties as directors of the first respondent and the eighth defendant as de facto director of the first respondent to ensure that the affairs of the first respondent were properly administered and its property not dissipated and exploited for their benefit to the prejudice of the appellant as creditor of the first respondent.

(b) in failing to consider the evidence adduced during the trial and come to findings that:

(i) the charge were wrongfully created. in this regard the honorable judicial commissioner failed to consider the evidence led by SP1 which was corroborated by contemporaneous documents and statutory records all of which was never challenged or controverted by any of the respondents;

(ii) the supporting documents for the 25 applications ('applications') for drawdowns of monies from the invoice financing facility signed by SP5, the third and fourth respondents did not reflect genuine sale transactions of the first respondent and were in fact fictitious as confirmed by the subpoenaed witnesses representing the four purported customers named in the namely SP4, SP6, SP7 and SP10. In this regard, the honorable judicial commissioner erred in failing to find that the applications were illegal and not for a proper and legitimate purpose;

(iii) the third and fourth respondents (who were directors of the first respondent at the material time) did not lead any evidence to show that the monies drawndown pursuant to the applications were in fact utilized for the first respondent's legitimate business purposes and neither did any of the other respondents; and

(iv) a substantial portion of the funds from the drawdowns that were deposited into the first respondent's Maybank Account No 501039149915 ('Maybank account') were wrongfully paid to the third, fifth and eighth respondents for no legitimate purpose in the following manner:

(1) a total of RM200,000 was paid to third respondent vide Maybank cheque Nos 41564, 41565, 41567, and 41568 (exh D22A–D). In this regard no consideration was given by the honorable judicial commissioner to the third respondent's own admission of receiving the same in previous judicial proceedings;

(2) a sum RM990,000 paid to fifth respondent vide Maybank cheque No 41444 (exh 019). In this regard, the Honorable Judicial Commissioner disregarded the failure of the fifth respondent to testify and controvert the evidence of the payment and failed to take into account the respondent's evidence that the fifth respondent admitted receiving the same; and

(3) a total of RM990,000 was paid for the benefit of the eighth respondent vide Maybank cheque Nos 41449, 41450 and 41451 (exh P14A–C) which was transferred into his OCBC Singapore Account No 068061 001. In this regard, the honorable judicial commissioner disregarded the evidence of SPS and SP11 and failed to invoke an adverse inference against the eighth respondent for failing to produce his bank statement.

(c) in failing to appreciate that the appellant's cause of action against the first respondent for an indemnity is premised on ss 93 and 98 of the Contracts Act 1950 and not for the tort of conspiracy to injure;

(d) in failing to address his mind and find that the appellant suffered loss and damage as a result of having to redeem and discharge property D by reason of the first respondent's failure to repay OCBC and is entitled to be indemnified for the said loss;

(e) in finding that third, fourth and sixth defendants are not liable despite being directors of the appellant by taking into account the following irrelevant considerations:

(i) letters of indemnity issued by the second respondent to the third and fourth respondent;

(ii) evidence to show that the third, fourth and sixth respondents were only employees who acted under instructions; and

(iii) evidence to show that the second respondent was the main employer whose instructions could not be disobeyed.

(f) in applying the beyond reasonable doubt standard of proof and should instead have applied the balance of probabilities standard of proof;

(g) in failing to appreciate that the elements of a conspiratorial agreement include 'a combination of efforts' as per *Renault SA v Inokom Corp Sdn Bhd & Anor and other appeals* [2010] 5 MLJ 394. In this regard, the honorable judicial commissioner failed to take cognisance that the several overt acts pleaded against the individual respondents amount to a combination of efforts by them for an unlawful purpose or by unlawful means;

(h) in failing to adopt the approach to evaluating the several overt acts pleaded against the individual respondents set out in *Khoo Teng Chye v Cekal Berjasa Sdn Bhd & Anor* [2015] MLJU 992; [2015] 6 CLJ 449 and instead evaluated them in a blinkered and restrictive fashion so as to find that the overt acts did not amount to an agreement;

(i) in failing to find that the combination of efforts through the overt acts pleaded resulted in the appellant being injured and suffering loss and damage and in this regard failed to appreciate and apply the ratio in the House of Lords decision of *Sorrell v Smith* [1925] AC 700 and the English Court of Appeal case of *Regina v Simmonds and others* [1969] 1 QB 685;

(j) by taking into consideration the following irrelevant matters in finding that the appellant either did not suffer loss or that it was improbable that losses occurred as a result of the pleaded over acts because:

(i) there was no agreement in the first place;

(ii) the monies drawdown from OCBC were credited into the first respondent's bank account;

(iii) the cheque books were kept by Neo Thian Chuan ('Neo'), the first respondent's finance manager; and

(iv) the invoice financing facility was for the benefit of the first respondent and not intended to injure the appellant.

(k) or drawing an adverse inference against the appellant for failing to call Neo to testify on its behalf when in fact it ought to have been invoked against the directors of the first respondent namely the third, fourth fifth and sixth respondents and the eighth defendant as de facto director for their failure to call Neo;

(l) by failing to consider and give any weight to the evidence led by the appellant's witnesses and SD1 on the systematic mismanagement of the first respondent and the dissipation and hiving off of its assets in furtherance of the Scheme;

(m) in failing to find that the directors of the first respondent including the eighth respondent as a de facto director owe a duty to the first respondent and its creditors and sureties (which includes the appellant) to properly administer the affairs of the first respondent and not to dissipate or exploit its assets for their own benefit or to the detriment of its creditors and sureties as per the ratio in the House of Lords decision in *Winkworth v Edward Baron Development Co Ltd and others* [1987] 1 All ER 114;

(n) in failing to find that the third, fourth, fifth, sixth and eighth respondents breached their duties and are liable to the appellant's losses which arose by reason of the first respondent's inability of pay OCBC on account of the wrongful dissipation of its assets;

(o) in misapprehending and misapplying the ratio in *Syarikat Kemajuan Timbermine Sdn Bhd v Kerajaan Negeri Kelantan Darul Naim* [2015] 3 MLJ 609; [2015] 2 CLJ 1037 in relation to the fourth and fifth respondents who closed their respective cases without testifying themselves nor adducing any evidence through any other witnesses and who did not submit a no case to answer. The honorable judicial commissioner ought to have instead followed the approach in the Federal Court decisions of *Jaafar bin Shaari & Anor (suing as administrators of the estate of Shofiah bte Ahmad, deceased) v Tan Lip Eng & Anor* [1997] 3 MLJ 693 and *Takako Sakao (f) v Ng Pek Yuen (f) & Anor* [2009] 6 MLJ 751. The honorable judicial commissioner ought to have drawn an adverse inference against the fourth and fifth respondents;

(p) in failing to consider the effect of the third respondent closing his case without making himself available for continued cross examination and abandoning his testimony mid-stream. In this regard, the honorable judicial commissioner failed to consider and follow the Federal Court decision of *Dr Shanmuganathan v Periasamy s/o Sithambaram Pillai* [1997] 3 MLJ 61 and the decision of *Superintendent of Lands & Surveys, Bintulu v Nor Anak Nyawai & Ors and another appeal* [2006] 1 MLJ 256; [2005] 3 CLJ 555;

(q) in failing to find that the third, sixth and eighth respondent's testimony lacked credibility and plausibility and to find the evidence adduced by the appellant's witnesses to be credible and when considered with the contemporaneous documents to have been sufficient to discharge the appellant's evidential and legal burden of proof;

(r) in finding that the appellant failed to prove that the seventh respondent breached his fiduciary duties towards the appellant;

(s) in taking into account irrelevant matters including matters that went beyond the scope of the respondent's pleaded defenses; and

(t) in failing to judicially appreciate the totality of the evidence by the appellants and/or to give any or any sufficient weight to the same.

[44] In this appeal, the appellant maintain its stand that the creation of the third party charges were not for the benefit of KHH and KHR. The unlawful acts were allegedly committed at different periods of time; the procurement of the revised facility from OCBC of which 26 fictitious transactions were undertaken in a mere four months, the full sum under the loan totaling up to RM5m had been fully utilised without any intention of repaying the same. Instead, the some of the respondents directly benefited from the fictitious transactions; despite knowing the dire state of first respondent, the directors of first respondent took no steps to settle the indebtedness; the divestment of first respondent's assets placed first respondent in a position where it was unable to settle its debts; and the directors of first respondent allowed first respondent to be wound up resulting in OCBC commencing foreclosure proceedings on property C and property D that belonged to KHH and KHR.

[45] In light of the unlawful acts committed by the second to eighth respondents against the best interest of first respondent, the actions were commenced to seek for damages based on the liability of first respondent towards KHH and KHR for redeeming the charged property C and property D from OCBC pursuant to the revised facility; the tort of conspiracy on the part of the deceased Lim, the third respondent, the fourth respondent, the fifth respondent, the sixth respondent, and the eighth respondent who although at different periods were conspirators, participants and/or joint tortfeasors in a scheme with the predominant purpose of injuring KHH and KHR by intentionally putting first respondent in a position of inability to pay its debts; and the breach of fiduciary duties by the deceased Lim, the third respondent, the fourth respondent, the fifth respondent, the sixth respondent, and the eighth respondent (as the de facto director of first respondent).

[46] In view of this suit brought against first respondent for failing to service the said OCBC facility whereby KHH and KHR's properties were in danger of being foreclosed and that KHH and KHR had utilised its own funds to redeem those properties for RM5.8m and as a result, thereof, KHH and KHR are claiming loss and damages arising from the redemption of the said properties, in avoiding liability arising from KHH and KHR's claim, first respondent is claiming for indemnity and contribution from the estates of the deceased Lim to ninth respondent being the officers of first respondent as the monies drawn down from the OCBC facility obtained was alleged not utilised for first respondent's benefit or business.

[47] We heard the appellant's submissions and also relied on the written submissions. The appellant submitted that the learned JC erred in law and on the facts in arriving at the decision on the grounds stated at para 43 above. By those grounds, the appellant submitted that this court should intervene to correct the decision of the learned JC and allowed this appeal. We also heard the submissions from the respondents and also considered their written submissions which supported the finding of facts by the learned JC.

[48] Generally, an appellate court will not intervene with the decision of the trial court unless it can be shown that the High Court arrived at a decision that was 'plainly wrong'.

APPELLATE INTERVENTION

[49] A first instance judgment is open to challenge when it fails to address or wholly ignores material evidence or issues placed before it, or when bad findings of fact are made with no reasoning or evidence to substantiate such findings. Equally errors of law, a clear misunderstanding of relevant evidence and such clearly identifiable errors will all contribute towards a decision that would be considered to be 'plainly wrong' (*MMC Oil & Gas Engineering Sdn Bhd v Tan Bock Kwee & Sons Sdn Bhd* [2016] 2 MLJ 428).

[50] The jurisdiction of the Court of Appeal to intervene against a decision of the High Court has to rest on settled principles; the court should only upset a decision of the High Court where there is a clear error leading to a perverse finding or resulting in miscarriage of justice, particularly where the lower court has decided on the basis of discretion (*Merbok Hilir Bhd v Sheikh Khaled Jassem bin Mohammad Jassem Al-Thani (t/a Petroserv General Trading Establishment) and other appeals* [2013] 5 MLJ 407; [2013] 8 CLJ 309 (CA). See also: *Yu Gui v Jeffery Law Siew Su & Ors* [2016] 1 MLJ 102; [2016] 7 CLJ 540 (CA); *Bank Pertanian Malaysia Bhd v MCI Bio Tech Sdn Bhd* [2013] 6 MLJ 537; [2013] 9 CLJ 29 (CA); *Conlay Construction Sdn Bhd v Perembun (M) Sdn Bhd* [2014] 1 MLJ 80; [2013] 9 CLJ 828 (FC); *Pushpaleela a/p R Selvarajah & Anor v Rajamani d/o Meyappa Chettiar and other appeals* [2019] 2 MLJ 553; *S Quarry Sdn Bhd v Desaru Development Corp Sdn Bhd & Ors* [2019] MLJU 99; [2019] 1 LNS 93; *Merita Merchant Bank Singapore Ltd v Dewan Bahasa dan Pustaka* [2018] supp MLJ 33; [2014] 9 CLJ 1064; *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1 (TAB 2); *UEM Group Bhd (previously known as United Engineers (M) Bhd v Genisys Integrated Engineers Pte Ltd & Anor* [2018] supp MLJ 363; [2010] 9 CLJ 785 (TAB 3); and *Dream Property Sdn Bhd v Atlas Housing Sdn Bhd* [2015] 2 MLJ 441).

OUR VIEW

[51] To begin with, in the appellant's re-amended statement of claim in Suit 59 (Appeal 232) the appellant prays for the following reliefs:

(a) a declaration the land property D was wrongfully encumbered by the third party charge and damages to be assessed in respect of any loss or damage suffered by the appellant for loss of use and/or the appellant's entitlement of property D as a result of the creation of the charge from 16 February 2006 to the date of redemption;

(b) a declaration that the respondents had wrongfully conspired to injure the appellant by wrongfully creating the charge over property D and wrongfully encumbering the same and damages for conspiracy against all the respondents to be assessed; and

(c) the sum of RM2.8m for redemption of property D together with interest thereon at the rate of 5%pa from 7 February 2014 to date of full payment.

[52] It is not disputed that OCBC Bank (M) Sdn Bhd vide a letter of offer dated 8 August 2005 had offered a financing facility of RM10m to the first respondent with the properties amongst others property D and property C placed as security. On 30 November 2007, the first respondent issued a letter to OCBC Bank (M) Bhd requesting for a restructuring of the said financing facility and to convert it into an Omnibus Trade line account. OCBC consented to the request made by the first respondent and a revised facility from RM10m to RM5m was offered. Guarantee for the revised facility was maintained on the existing third party charge on property D and property C and on 24 March 2008, the Board to Directors of KHH and KHR passed a resolution to create a third party charge on property D and property C for the revised financing facility.

[53] The appellant's commencement of actions was to recover losses suffered resulting from the redemption of two properties namely, property C and property D, owned by KHH and KHR, which were subjected to third party charges by OCBC Bank Bhd ('OCBC') as a collateral for a trade facility vide letter of offer dated 18 March 2008 ('revised facility') granted to the first respondent.

[54] The actions against the respondents are for acts of conspiracy and breach of fiduciary duties for the unlawful creation of the third party charge of property C and property D to injure the appellant. The appellant's cause of action against the first respondent for an indemnity is premised on ss 93 and 98 of the Contracts Act 1950 and not for the tort of conspiracy to injure.

A **[55]** In the grounds of judgment, the learned JC had identified two issues for court's determination. The issues are whether the first, third, fourth, sixth, seventh and ninth respondents had conspired to cause damages to KHH and KHR. To determine this issue, the sourt made a finding whether the respondents had entered into an agreement to commit fraud in the creation of the third party sharge. The other issue is whether the third, fourth, sixth, seventh and ninth defendants had breached their fiduciary duty towards KHH and KHR.

C **[56]** From the above revelation of facts, our preliminary observation shows that that KHH, KHR and first respondent is controlled by the deceased Lim and was the founder and/or owner and/or managing director for KHH, KHR and first respondent. The controlling mind behind the creation of the third party charge on KHH and KHR properties, accepted by first respondent was the deceased Lim. In other words, as the owner and managing director, the deceased Lim was the decision maker in the management and business affairs of KHH, KHR and first respondent. The decision of the learned JC was not in the appellant's favor because the appellant failed to prove such a meeting of minds to do an unlawful acts exists among the respondents to injure the appellant. It is necessary to show a meeting of minds or agreement in order to succeed.

[57] We found that the appellant's grounds in para 1.2 complaining that the learned JC erred in law and on the facts by failing to find on a preponderance of evidence that the appellant had established liability against the deceased Lim to the seventh respondents for breach of their fiduciary duties to the appellant for the wrongful creation of the charge is without merit.

G **[58]** In our view, the creation of the charge is lawful because the Board to Directors of KHH and KHR passed a resolution to create a third party charge on property D and property C for the initial facility of RM10m and later revised the facility to RM5m. The appellant knew and had approved for the properties to be given to first respondent which first respondent Board of Directors' resolutions was accepting the appellant eight properties including property C and D to be charged in favor of OCBC. The submission by the appellant that the deceased Lim to eighth respondents had committed the unlawful acts of creating the third Party charges executed to encumber property C and property D is untenable and has no merit.

I **[59]** Be that as it may, it was argued that the learned JC failed to appreciate that the elements of a conspiratorial agreement include 'a combination of efforts' for an unlawful purpose or unlawful means as per *Renault SA v Inokom Corp Sdn Bhd & Anor and other appeals* [2010] 5 MLJ 394 cited by the appellant. We considered the argument. In our view, the learned JC has made

a finding of facts that the several overt acts pleaded against the individual respondents did not amount to a combination of efforts by them for an unlawful purpose. A finding of facts is a result of evaluating the several overt acts pleaded against the individual respondents. In view of that we did not think that the case of *Khoo Teng Chye v Cekal Berjasa Sdn Bhd & Anor* [2015] MLJU 992; [2015] 6 CLJ 449 referred by the appellant to suggest that the learned JC has evaluated them in a blinkered and restrictive fashion applies.

[60] Having perused the ground of judgment carefully, we were satisfied that the learned JC had evaluated the evidence before him and found the allegation to commit the fraud as alleged by KHH and KHR and breach of fiduciary duty or conspired in the scheme by the respondents to do unlawful act by unlawful means for the purpose of injuring the KHH and KHR which resulted in damage to the them had not been made out because there is no evidence to prove the allegations exists. The decision is not plainly wrong.

[61] As held by the Court of Appeal in *SCK Group Berhad & Anor v Sunny Liew Siew Pang & Anor* [2010] MLJU 1376; [2010] 9 CLJ 389, the tort of conspiracy is not constituted by the conspiratorial agreement alone. For conspiracy to take place, there must also be an unlawful object, or, if not in itself unlawful, it must be brought about by unlawful means. There must be a co-existence of an agreement with an overt act causing damage to the plaintiffs. Hence, this tort is complete only if the agreement is carried into effect, thereby causing damage to the plaintiffs. In order to succeed in a claim based on the tort of conspiracy, the plaintiffs must establish that there must be a co-existence of an agreement with an overt act causing damage to the plaintiffs. Hence, this tort is complete only if the agreement is carried into effect, thereby causing damage to the plaintiffs. In order to succeed in a claim based on the tort of conspiracy, the plaintiffs must establish: an agreement between two or more persons; for the purpose of injuring the plaintiff; and acts done in the execution of that agreement resulted in damage to the plaintiff.

[62] It was also held that if the predominant purpose of the defendants is to protect or advance their own self-interest, even though damage to the plaintiff is an unintended consequence, it is not actionable. The lawful acts or unlawful means for purposes of the tort may be crimes or torts or breaches of statutory provisions. The burden of proving the existence of an agreement or arrangement among the defendants is on the plaintiff and a high degree of proof is required. This principle is found in *Lum Sow Kuen v Chuah Choong Heong & Ors* [1998] MLJU 39 which sets out the principles governing conspiracy (see: also the leading cases on the law of conspiracy, namely *Lonrho Ltd and others v Shell Petroleum Co Ltd and others (No 2)* [1981] 2 All ER 456, *Lonrho plc v Fayed and others* [1991] 3 All ER 303, and *Seagate Technology (S) Pte Ltd & Anor v Heng Eng Li & Anor* [1994] 1 SLR 534 and affirmed by the

Singapore Court of Appeal on the issue of conspiracy and reported in [1995] 1 SLR 17 at pp 23–26 and the commentary in *Clerk & Lindsell on Torts* (17th Ed) (1995) pp 1267–1287).

[63] What is a conspiracy? The Federal Court in *Mrs Kok Wee Kiat v Kuala Lumpur Stock Exchange Berhad & Ors* [1979] 1 MLJ 71, approved the following definition of conspiracy of *Clerk and Lindsell on Torts* (13th Ed) p 817, viz: A conspiracy consists ... in the agreement of two or more to do an unlawful act, or to do a lawful act by unlawful means. *Halsbury's Laws of England* Vol 45 (4th Ed) at para 1527, states that the essential ingredients of conspiracy are: (1) an agreement between two or more persons; (2) an agreement for the purpose of injuring the plaintiff; and (3) that acts done in execution of that agreement resulted in damage to the plaintiff. It is not enough that two or more persons pursued the same unlawful object at the same time or in the same place; it is necessary to show a meeting of minds, a consensus to effect an unlawful purpose though it is not necessary that each conspirator should have been in communications with each other (*Halsbury's Laws* Vol 11 (4th Ed) para 58).

[64] As for the law regarding conspiracy and fraud, it must be determined what 'fraud' is. Whether fraud exists is a question of facts to be decided upon the circumstances of each particular case (see: *Hock Hua Bank (Sabah) Bhd v Lam Tat Ming & Ors* [1995] 4 MLJ 328; *PJTV Denson (M) Sdn Bhd & Ors v Roxy (Malaysia) Sdn Bhd* [1980] 2 MLJ 136 at p 138). Conspiracy to defraud remains a common law offence, the mens rea of which has been defined as 'to cause the victim economic loss by depriving him some property or right corporeal or in corporeal, to which he is or would or might become entitled (see *Lee Wai Fay & Anor v Lee Seng Ein* [2005] 4 MLJ 701; [2005] 3 CLJ 397 (CA)).

[65] We referred to the case of *Deepak Jaikishan a/l Jaikishhan Rewachand & Anor v Intrared Sdn Bhd (previously known as Reetaj City Centre Sdn Bhd and formerly known as KFH Reetaj Sdn Bhd) & Anor* [2013] 7 MLJ 437 at p 437, where Nallini Pathmanathan J (as she then was) held that:

> [112] As stated at the outset in relation to the law, the first element that has to be established is the existence of an agreement between the conspirators, namely Infrared and KFH, or a combination of action or concerted action between Infrared and another person or persons to injure the plaintiffs (see *Kuwait Oil Tanker Company SAK v Al-Bader and others*). As also stated in that case, it is not necessary to show anything in the nature of an express agreement, whether formal or informal. It is sufficient if two or more persons combine with a common intention, or that they deliberately combine, albeit tacitly to achieve a common end. How then is this to be ascertained? As stated in *R v Siracusa* the existence of such an agreement or combination of action with a common purpose can only be inferred from overt acts.

[66] From the above-distilled principles and applying the same in respect of the respondents, the appellant must prove that there was an agreement or arrangement among the respondents to carry out an overt act. The learned JC made a finding that the evidence tendered by KHH and KHR cannot prove that the third respondent, the fourth respondent, the sixth respondent, the seventh respondent, the ninth respondent as well as the deceased Lim and the fifth respondent had conspired with each other or with illegal intention or by unlawful means to injure KHH and KHR. KHH and KHR also failed to show who respondents aforementioned had breached their fiduciary duty towards KHH and KHR.

[67] It was argued that the learned JC ought to have drawn an adverse inference against the fourth and fifth respondents. The learned JC failed to consider the effect of the third respondent closing his case without making himself available for continued cross examination and abandoning his testimony mid-stream, therefore, failed to consider and follow the Federal Court decision of *Dr Shanmuganathan v Periasamy s/o Sithambaram Pillai* [1997] 3 MLJ 61 and the decision of *Superintendent of Lands & Surveys, Bintulu v Nor Anak Nyawai & Ors and another appeal* [2006] 1 MLJ 256; [2005] 3 CLJ 555.

[68] It was also argued that the learned JC had misapprehended and misapplied the ratio in *Syarikat Kemajuan Timbermine Sdn Bhd v Kerajaan Negeri Kelantan Darul Naim* [2015] 3 MLJ 609; [2015] 2 CLJ 1037 in relation to the fourth and fifth respondents who closed their respective cases without testifying themselves nor adducing any evidence through any other witnesses and who did not submit a no case to answer.

[69] We considered the arguments and found the grounds raised are without merit. The learned JC in his grounds of judgment found there is no issue arising from the failure of the fourth and sixth respondents to give evidence as KHH and KHR have failed to prove that the fourth, sixth respondents together with the third, seventh, ninth respondents as well as the deceased Lim and fifth respondent had committed the tort of conspiracy with the purpose of causing damages to KHH and KHR.

[70] We were aware of the approach in the Federal Court decisions of *Jaafar bin Shaari & Anor (suing as administrators of the estate of Shofiah bte Ahmad, deceased) v Tan Lip Eng & Anor* [1997] 3 MLJ 693 and *Takako Sakao (f) v Ng Pek Yuen (f) & Anor* [2009] 6 MLJ 751 that in such case the learned JC must presumed the appellant's evidence to be true.

[71] The Federal Court in *Letchumanan Chettiar Alagappan @ L Allagappan (as executor to SL Alameloo Achi alias Sona Lena Alamelo Acho, deceased) & Anor*

v Secure Plantation Sdn Bhd [2017] 4 MLJ 697 at pp 739–740, paras 54 and 56 held that:

> [54] Section 101(1) provides that 'Whoever desires any court to give judgment as to any legal right or liability, dependent on the existence of facts which he asserts, must prove that those facts exist'. 'Section 101 states that the initial burden of proving a prima facie case in his favor is cast on the plaintiff ...' (Woodroffe and Amir Ali, *Law of Evidence* (19th Ed, Vol 3) at p 3194). Illustration (b) to s 101 puts it beyond doubt that the 'burden of proof' rests throughout on the plaintiff. Section 102 provides that 'The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side'. 'The initial onus of proving the case is always on the plaintiff' (*Sarkar Law of Evidence* 16th Ed at p 1593). Illustration (a) to s 102 puts it beyond doubt that a plaintiff has the initial onus of proof ...
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> [56] Thus, a plaintiff has both the burden of proof as well as the initial onus of proof. In *Britestone Pte Ltd v Smith & Associates Far East, Ltd* [2007] 4 SLR 855, the Singapore Court of Appeal per VK Rajah JCA, delivering the judgment of the court, explained that at the start of the plaintiff's case the burden of proof and the onus of proof coincide:
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> > ... at the start of the plaintiff's case, the legal burden of proving the existence of any relevant fact that the plaintiff must prove and the evidential burden of some (not inherently incredible) evidence of the existence of such fact coincide. Upon adduction of that evidence, the evidential burden shifts to the defendant, as the case may be, to adduce some evidence in rebuttal. If no evidence in rebuttal is adduced, the court may conclude from the evidence of the defendant. If, on the other hand, evidence in rebuttal is adduced, the evidential burden shifts back to the plaintiff. If, ultimately, the evidential burden comes to rest on the defendant, the legal burden of proof of the relevant fact would have been discharged by the plaintiff. The legal burden of proof- a permanent and enduring burden - does not shift. A party who has the legal burden of proof on any issue must discharge it throughout. Sometimes, the legal burden is spoken of, inaccurately, as 'shifting'; but what is truly meant is that another issue has been engaged, on which the opposite party hears the legal burden of proof.
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> [57] The rule is that 'the onus of proof of any particular fact lies on the party who alleges it, not on him who denies f.1; *et incumbit probation qui decit, non qui negat, actori incibit probation*. The plaintiff is bound in the first instance, to show a prima facie case, and if he leaves it imperfect, the court will not assist him. Hence the maxim *potior est* condition defendants. A plaintiff cannot obviously advantage himself by the weakness of the defence. A plaintiff's case must stand or fall upon the evidence adduced by him. When, however, the defendant, or either litigant party, instead of denying what is alleged against him, relies on some new matter which, if true, is an answer to it, the burden of proof changes sides; and he, in his turn, is bound to show a prima facie case at least and, if he leaves it imperfect, the court will not assist him. *reus excipendo fit actor*' (Woodroffe and Amir Ali, Vol3 at pp 3190–3191).

[72] The Court of Appeal had recently in *Lembaga Penggalakan Pelancongan*

Malaysia v One Big Option Sdn Bhd [2018] 1 MLJ 465 at pp 472–473 followed the decision of the apex court in *Syarikat Kemajuan Timbermine Sdn Bhd v Kerajaan Negeri Kelantan Darul Naim* [2015] 3 MLJ 609; [2015] 2 CLJ 1037 which sets out the effect of a submission of no case to answer:

> [15] ... In dealing with the issue of whether the appellate court can and ought to disturb findings of fact reached by the trial court where the evidence led by the plaintiff are assumed to be true when the defendant elected not to call any witnesses, the Federal Court made the following observations at p 617 (MLJ); p 1059 (CLJ):
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> > [56] The first is that the principle on which an appellate court could interfere with findings of fact by the trial court is the plainly wrong test (see *Gan Yook Chin & Anor v Lee Ing Chin & Ors* [2005] 2 MLJ 10; [2004] 4 CLJ 309 and *UEM Group Bhd (previously known as United Engineers (M) Bhd v Genisys Integrated Engineers Pte Ltd & Anor* [2018] supp MLJ 363; [2010] 9 CLJ 785. And, the second is that the burden of proof at all times is of course borne by the plaintiff to establish on the balance of probability the existence of a legally enforceable settlement agreement (see *Ranbaxy (Malaysia) Sdn Bhd v El Du Pont De Nemours and Company* [2011] MLJU 1135; [2011] 1 LNS 16; [2011] 1 AMCR 857). In other words, it was upon the plaintiff itself, and certainly not the defendant to discharge the burden of showing the settlement agreement had come into existence. It is for the plaintiff to prove its case and satisfy the court that its claim is well founded before the court grants judgment on the claim (see *The Owners Of And All Other Persons Interested In The Ships Fordeco No 12 And Fordeco No 17 v Shanghai Hai Xing Shipping Co Ltd, The Owners Of The Ship Mv Xin Hua 10* [2000] 1 MLJ 449; [2000] 1 CLJ 695; *Maju Holdings Sdn Bhd v Fortune Wealth (HK) Ltd & Other Appeals* [2004] 4 MLJ 105; [2004] 4 CLJ 282; and *Teh Swee Lip v Jadewe/1 Holdings Sdn Bhd* [2013] 6 MLJ 32; [2014] 8 CLJ 451). It is true that in the present case the defendant elected not to call any witnesses. However, it is imperative to bear in mind that from the outset the legal burden of the existence of the settlement agreement was with the plaintiff as the claimant in the present action. By reasons of the legal principles, the fact that the defendant led no evidence or call no witnesses did not absolve the plaintiff from discharging its burden in Law. In this regard, in adopting the approach of the case of *Storey v Storey* [1961] P 63, Suriyadi JCA (as His Lordship then was) in *Mohd Nor Afandi Mohamed Junus v Rahman Shah Alang Ibrahim & Anor* [2008] 3 MLJ 81; [2008] 2 CLJ 369 recognised this to be the case as can be seen from the following passage of His Lordship's judgment:
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> > > There are, however, two sets of circumstances under which a defendant may submit that he has no case to answer. In the one case there may be a submission that, accepting the plaintiff's evidence at its face value, no case has been established in law. And in the other that the evidence led for the plaintiff is so unsatisfactory or unreliable that the court should find that the burden of proof has not been discharged.

[73] In this case, we agreed with the learned judge reference to the case of *Syarikat Kemajuan Timbermine Sdn. Bhd v Kerajaan Negeri Kelantan Darul Naim*. Although the principle is that that once a defendant elects not to call for

A evidence, apart from him being bound by that election, the effect is also that all the evidence led by plaintiff must be assumed to be true. However, the fact that the defendant led no evidence or call no witnesses did not absolve the plaintiff from discharging its burden in law. The evidence adduced by the plaintiff must still be sufficient to prove the claim.

B

[74] It was also argued that the learned JC erred in law by applying his mind to the 'beyond reasonable doubt' standard of proof for fraud in civil cases. We found this argument also have no merit. As seen at para 54 of the judgment, the learned JC held that on the balance of probabilities, KHH and KHR have
C failed to prove their claim against first respondent, the third respondent, the fourth respondent, the sixth respondent, the seventh respondent and the ninth respondent.

[75] We failed to see from the decision that it can be shown that the High
D Court arrived at a decision that was 'plainly wrong'. We were satisfied that the finding of facts of the learned JC was based on the evidence before him which the appellate court did not have the specific audio-visual advantage that a trial judge has is in respect of the assessment of the credibility of the oral evidence, being the witness examined and cross-examined before the trial judge, and the
E assessment of weight of such non-documentary evidence produced and examined before him. The findings of fact by the trial judge on such evidence is entitled to great weight, and unless that finding flies in the face of the mute evidence, cannot warrant appellate intervention (see: *Lin Wen-Chih & Anor v Mycom Bhd* [2014] 3 MLJ 691).

F

CONCLUSION

[76] Having considered the appellant's and the respondents' submissions and also relying on their written submissions, perusing the grounds of
G judgment of the learned JC and the record of appeal, we failed to see any appealable error in the judgment of the learned JC or the judgment is plainly wrong. We found the appeal has no merit.

H **[77]** Our decision is unanimous that both the appeals are dismissed with costs of RM2,000 each for first respondent and the deceased Lim's solicitors and RM10,000 for each set of other respondents' solicitors subject to allocator.

Both appeals dismissed.

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Reported by Ashok Kumar